

*In the United States Patent and Trademark Office*RECEIVED  
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DEC 29 2010

Appn. Number: 09/641,410  
Appn. Filed: August 18, 2000  
Applicant: Alice Mary O'Donnell Kiely  
Title: Edible Supports for Comestibles with Optional, Edible Mess Guards and  
Drip Guards  
Examiner/GAU: Keith Hendricks/Joyti Chawla 1794

Yorktown Heights, NY December 29, 2010

**RENEWED PETITION TO THE OFFICE OF PETITIONS****Petition to Withdraw the Holding of Abandonment under 37 CFR 1.181(a)**

Assistant Commissioner for Patents  
Arlington, Virginia 22313

Sir:

Applicant respectfully requests that the following petitions from Applicant's file jacket be considered in the Renewed Petition to the Office of Petitions filed December 16, 2010 for the above application.

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Appn. Number 09/641,410 (Kiely) GAU 1794 Re: Renewed Petition to Withdraw the Holding of Abandonment 2

**Request for Withdrawal of the Holding of Abandonment**

Attached is a copy of Applicant's petition to the Director filed 3/29/2009, which was referenced in the Renewed Petition to the Office of Petitions on December 16, 2010. Also attached is a copy of Applicant's Request for Reconsideration filed 9/10/2010 to this dismissed petition.

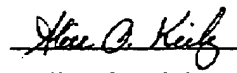
Applicant would like to request that the Office of Petitions review the information in the petitions of 3/29 and 9/10 along with, and as part of, the Renewed Petition filed on December 16, 2010.

Applicant respectfully submits that all evidence in Applicant's original petition, appeal, and renewed petition shows that the finality of the Office Action of July 9, 2009 was indeed premature.

As such, Applicant respectfully requests that the finality of this Office Action be withdrawn, and thus the abandonment.

Applicant looks forward to a favorable reply, for which Applicant respectfully petitions.

Very Respectfully,



Alice O. Kiely

71 Stonewall Court  
Yorktown Heights, NY 10598  
Tel. (914) 960-3506

Certificate of Facsimile: I certify that on the date below, this document and referenced attachments, if any, will be faxed to the central fax number of 571-273-8300 to the United States Patent and Trademark Office "Commissioner for Patents" Arlington, Virginia 22313.

Appn. Number 09/641,410 (Kiely) GAU 1794 Re: Renewed Petition to Withdraw the Holding of Abandonment 3

2010 December 29,

  
Alice O. Kiely

Attachments:

- 1) copy of Applicant's Petition to the Director of Patents sent 3/27/2010 - 52 pages
- 2) copy of Applicant's Appeal sent 9/10/2010 - 19 pages

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## FACSIMILE TRANSMITTAL SHEET

|               |  |                                     |   |
|---------------|--|-------------------------------------|---|
| TO:           | Commissioner for Patents<br>United States Patent and<br>Trademark Office | FROM:                               | Alice O. Kiely<br>71 Stonewall Court<br>Yorktown Heights, NY 10598-1819 |
| COMPANY:      |  | DATE:                               | 3/27/2010   |
| FAX NUMBER:   | 571-273-8300   | TOTAL NO. OF PAGES INCLUDING COVER: | 52  |
| PHONE NUMBER: |  |                                     | Keith Hendricks/1761  |
| RE:           | Application 09/641,410   | YOUR REFERENCE NUMBER:              |   |

☒ URGENT    ☐ FOR REVIEW    ☐ PLEASE COMMENT    ☐ PLEASE REPLY    ☐ PLEASE RECYCLE

NOTES/COMMENTS:

*In the United States Patent and Trademark Office*

Appn. Number: 09/641,410  
Appn. Filed: August 18, 2000  
Applicant: Alice O. Kiely  
Title: Edible Supports for Comestibles with Optional, Edible Mess  
Guards and Drip Guards  
Examiner/GAU: Keith Hendricks/1794

The following received today at the USPTO, Petition to Director to withdraw holding of abandonment under 37 CFR 1.181(a) for the above application , 52 pages Encl: 18 pages of remarks, petition to withdraw the finality of the office action of 7/9/2009, remarks regarding ongoing improper office actions, 33pages of Exhibits A through M, fax cover sheet, cover letter , signed Certificate of Facsimile 3/27/2010

*In the United States Patent and Trademark Office*

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DEC 29 2010

Appn. Number: 09/641,410  
Appn. Filed: August 18, 2000  
Applicant: Alice Mary O'Donnell Kiely  
Title: Edible Supports for Comestibles with Optional, Edible Mess Guards and  
Drip Guards  
Examiner/GAU: Keith Hendricks/Joyti Chawla 1794

Yorktown Heights, NY March 27, 2010

**Petition to Director**

**PETITION TO WITHDRAW HOLDING OF ABANDONMENT UNDER 37 CFR 1.181(a)**

Assistant Commissioner for Patents  
Arlington, Virginia 22313

Sir:

Applicant respectfully requests the withdrawal of the holding of abandonment for the application of 09/641,410, Edible Supports for Comestibles with Optional, Edible Mess Guards and Drip Guards.

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DEC 29 2010

Appn. Number 09/641,410 (Kiely) GAU 1794 Petition to Director to Withdraw Holding of Abandonment 2

**Petition To Withdraw Holding of Abandonment  
Based on Improper Final Rejection Under 37 CFR 1.181(a)**

This correspondence is in regard to U.S. Patent Application SR Number 09/641,410, Edible Supports for Comestibles with Optional, Edible Mess Guards and Drip Guards. Application 09/641,410 is a parent application to several divisional applications. Patent Application SR No. 09/641,410 was filed August 18, 2000, and is currently pending.

Applicant is in receipt of a final Office Action mailed July 9, 2009, for the above application. Applicants respectfully request that the finality of the Office Action, and thus abandonment should be withdrawn as the Office Action is improper.

Applicant respectfully requests going forward that examiners during examination: 1) address every element of Applicants claims as recited, [emphasis added] 2) properly address Applicant's subject matter of: a) a support for a frozen comestible comprising an edible "composite material," (as originally filed in claims 6, 19, 21-23, which is a term well known to one having ordinary skill in the art), and b) a support for a frozen comestible comprising an edible material, said edible material comprises two materials, and 3) specifically answer the substance of Applicant's arguments.

Applicant respectfully submits that the finality of the Office Action is improper because the Office has failed to address Applicant's claims as recited.

Applicant respectfully submits that the finality of the Office Action is also improper as the Office has failed to address every argument of Applicant under MPEP 707.07(f)

Applicant respectfully submits that the finality of the Office Action is also improper due to the introduction of a new reference in a final Office Action, not necessitated by an amendment of Applicant or an IDS, and therefore requests withdrawal of that finality, according to Section 706.07(a) of the Manual of Patent Examining Procedure (MPEP), which is also in violation of compact prosecution MPEP 707.07(g).

Applicant respectfully submits that the finality of the Office Action is also improper due to the withholding of Applicant's method claims from consideration without any evidence, suggestion, or argument of a patentably distinct species.

Applicant respectfully submits that the finality of the Office Action is further notably improper as Examiner Joyti Chawla had admitted to Applicant in a telephone conversation on January 29, 2010 to basing the rejections of all Applicant's claims on a truncated portion of Applicant's claims, "i.e. two constituent materials." ((Exhibit L, Summary of phone call, below)

Applicant respectfully submits that the finality of the Office Action is further noted to be improper, [emphasis added] as Examiner(s) have sustained all rejections based on willful and erroneous misinterpretation of Applicant's subject matter for years in PTO Office Actions, although the record shows that Examiners are well aware of Applicant's subject matter.

Additionally, Applicant respectfully submits that the finality of the Office Action is improper as Examiner Jyoti Chawla has also admitted to Applicant on the telephone call of January 29, 2010, that Examiner is "not making a 35 USC Section 102 rejection, but a section 103 rejection," yet continues to hold all claims rejected by that single reference under 35 USC Section 102, based solely upon truncating Applicant's claims and without any evidence.

Furthermore, Applicant respectfully submits that the finality of the Office Action is also improper, as while the Office Action(s) agrees that all elements in Applicant's claims are NOT anticipated by a single reference (Office Action admits that the support of the single reference to Musher is *entirely frozen* [Applicant's is non frozen]) the reference has not been withdrawn and continues to be used to hold all claims rejected under section 102, without evidence for many years while on its face does not anticipate Applicant's claims.

#### **Applicant's Disclosure (Background)**

Three Disclosure Documents claiming date of conception of Applicant's supports were filed with the US Patent and Trademark Disclosure Document Program in 1994, 1996, and 1999.

In response to the restriction of 5/2/02, Applicant had elected, wherein the support is a candy bar and filed claims of a support comprising a composite candy. (Exhibit M, top arrow, right side)

In response to the restriction of 12/19/2002, Applicant had elected Species III, wherein the support is a composite support as shown e.g. in Fig. I,

Composite support 62 as shown in Fig. 1:

#### **The specification recites in part:**

[0165] Preferably, support 62 is an elongated and slenderized, multi-ingredient, candy bar (made to a suitable size and shape to support the confection) such as those found at the check-out counter of a grocery store.

[0166] One such candy bar has the ingredients of a whipped chocolate nougat center that is then coated with a thick chocolate coating (barrier 86), sold under the trademark Three Musketeers by Mars, Incorporated of Hackettstown, N.J. Another suitable candy bar that contains the ingredients of a whipped chocolate nougat center 90, topped with a thick layer of caramel 88, which is then totally dipped in a thick chocolate coating 86 (FIG. 27D), is one sold under the

trademark Milky Way, also by Mars, Incorporated. (The ingredients and barrier or chocolate coating 86 are not specifically shown in support 62 in FIGS. 1 and 2, for clarity, but are shown in FIGS. 15A, 27A-E). Another suitable candy bar for an edible support is made with the ingredients of an elongated dense cookie, coated on top with a thick layer of caramel, which is then dipped in a chocolate coating, (FIG. 27B) such as the one sold under the trademark Twix, also by Mars, Incorporated. A frozen Twix candy bar efficiently supports confection 84.

[0167] Other candy bars that are also suitable as edible supports for confection 84, such as the one sold under the trademark, Butterfinger, by Nestle Incorporated, of Glendale, Calif., has the ingredients of ground roasted peanuts, dipped in a thick chocolate coating (and other ingredients) and one sold under the trademark Snickers, also by Nestle, has peanuts, caramel and a chocolate coating. Another candy bar sold under the trademark 100 Grand, also by Nestle, has the ingredients of chewy caramel, milk chocolate and crispy crunchies (FIG. 27C). 100 Grand candy bar, if slenderized, elongated and frozen is an efficient support 62 for confection 84. A candy bar sold under the trademark Baby Ruth, also by Nestle, with the ingredients, peanuts, caramel and nougat, also if slenderized is a rich, edible support for confection 84. Other suitable candy bars are the candy bars sold under the trademarks Mounds and Almond Joy, both by Hershey Foods Corporation, of Hershey, Pennsylvania. These supports may be any size, length, width, shape or thickness. A bite size additional fun ingredient 100, sold under the trademark Nestle Bites also of Nestle Incorporated, which has several flavors, may be added to confection 84 or an edible support for additional enjoyment. These candy bars offer a familiar and desired taste to many people in the United States and to many people of other countries throughout the world.

**End of partial Background**

#### **Grounds**

As grounds for this Request, Applicant states as follows:

In replies to the non-final and final Office Actions, Applicant requested that the finality of the Office Actions not be made final, and then the finality removed, and specified the reasons why the a final Office Action would be improper. (11/23/2009, 25 pgs.; and 10/9/2009, 20 pgs.) Applicant's reasons why the final Office Action would be improper were not addressed in the advisory actions, except for upholding denying Applicant method claims, for which Examiner's reason is incorrect on the record, i.e. PTO Office Actions, below.

#### **Election/Restriction**

##### **1) Regarding Election/restriction:**

Examiner's stated grounds for withholding of Applicant's method claims from examination:



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"Newly submitted claims 403-416 are directed to a method of making a support, i.e., an invention that is independent or distinct from the invention elected in response filed January 18, 2003 to the original restriction requirement." Since Applicant had elected a product and not the method of making in response to the election requirement the method of making the product, i.e. claims 403-416 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP section 821.03. Thus claims 403-41 will not be examined in the present Office Action.

Examiner has failed to address Applicant's argument that no restriction for a method claim had ever been made. (Exhibit A, pg 1-3, restriction of 5/2/2002); Exhibit B, election of 1/18, 2003); (Exhibit C, pgs. 1/4 - 4/4) (Method claims had also been previously presented on 1/28/2008, 5/16/2008, 7/30/2008, 8/20/2003, 8/18/2000 (date of filing)).

**N.B.** Contrary to examiner, the first Office Action on the merits did in fact address Applicant's method claims (Exhibit H, pg. 4/5, 5/23/2003): "In regard to method claim 95, since...) No restriction had been made.

An objection to the method claims could have been made at the time of the election requirement on 5/2/2002, (Exhibit A), however Examiner did not object. An objection to the method claims could have been made at the time of the first Office Action on the merits on 5/23/2003, (when they were addressed, (Exhibit H, pg. 4/5), or even the final Office Action of 3/9/2004, or any of the times directly above, however examiner did NOT object. (MPEP 2106 II, "...Thus, USPTO personnel should state all reasons and bases for rejecting claims in the first Office Action.")

Applicant further argued that as far as Applicant is aware, electing a species does not preclude one from including a method claim(s). Applicant is entitled by right to a method claim(s) MPEP 800, if the claims are not patentably distinct. To continually deny Applicant access to a method claim(s) based solely upon the election of a species, especially when NO restriction had ever been made, and NO reason of the method claims being patentably distinct had ever been stated by examiner, is improper. This argument was not addressed or answered by examiner either.

In the advisory action of 1/28/2010, Examiner stated that a reason for rejection of the method claims is that Applicant's method claims were not present as of the time of the election, and stated that the "claims are directed to a method of making a support, i.e., an invention that is independent or distinct from the invention elected in response filed January 18, 2003 to the original restriction requirement." (Exhibit E - Advisory Action 1/28/2010) Applicant's method claims were present at the time of filing, and these method claims had been addressed by the PTO in the first Office Action on the merits and were not restricted. (Exhibit H, pg. 4/5, above) (Exhibit D - August 18, 2000). Applicant had also argued that as far as Applicant knew, method claims need not be present at the time of a restriction, but only they cannot be patentably distinct. This argument had not been answered. (Applicant's response filed on January 18, 2003 is also not the "original" restriction requirement, as examiner states. See restriction of 5/2/2002)

Examiner had also failed to address Applicant's argument that method claims had been included as originally filed on 8/18/2000 (claims 28, 29(30)) (Exhibit D).

Examiner had also failed to state examiner's burden of proof as to how Applicant's method claims *are directed to a non-elected invention*. Other than to say:

"Since Applicant had elected a product and not the method of making in response to the election requirement..." or "not present as of the time of the election."

N.B. Examiner has failed to give any reasoning whatsoever as to how Applicant's method claims are directed to a non-elected invention. Applicant argued that Applicant's method claims are generic to the invention being examined and considered proper unless proven otherwise. Failure to show a distinct non-elected invention while withdrawing Applicant's method claims from consideration constitutes an improper Office Action. Applicant respectfully requests examiner state *specifically* how Applicant's method claims constitute a patentably distinct species, or Applicant respectfully requests immediate removal of the withdrawal of Applicant's method claims from consideration, and be properly examined.

### Amendments to Specification

Examiner states:

"The amendment filed March 16, 2009, is once again objected to under 35 USC 132(a) because it introduces new matter into the disclosure. The claims contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. In the instant case the term "composite material" as added to the claims introduces new matter as the term is not disclosed in the original disclosure and the introduction of the term "composite material" changes the description of "a candy bar" to "a composite material candy bar" which is not the same as a generic term "candy bar" as originally described."

2) Regarding **Amendment to Specification**, examiner has continually failed to respond to Applicant's argument that the term "composite material" could not be "new matter," when Applicant had shown documentation many many times to examiner that the term "composite material" had been specifically recited in the original disclosure in claims 6, 19, 21-23, filed August 18, 2000. (Exhibit F, pg. 1-3)

Applicant had also made the argument that Applicant is permitted to amend the specification with the term "composite material," as the term was originally filed in at least claims 6, 19, in accordance with MPEP 608.01 (Exhibit G pgs. 1-3). Also Applicant's specification teaches of a "composite candy bar," in paragraphs [0195], [0196], [0197], and [0199], "composite candy bar

with chocolate, nuts and nougat inside,” and specifically teaches a myriad of examples of composite material candy bars such as Snickers(tm), Milky Way (tm), Twix (tm), Kit Kat (tm), Kudos (tm), Butterfinger (tm), Baby Ruth (tm), and many others. These candy bars are plainly known to one having ordinary skill in the art to be a composite material candy.

Examiner has failed to show any evidence to the contrary but continues to make the Office Actions final *without any evidence*, which constitutes improper Office Actions. Examiner must consider and respond to the substance of Applicant’s argument. As of the present, examiner has not addressed the “substance” of Applicant’s arguments and continues to reject the request to amend the specification, as may be permitted in accordance with MPEP 608.01.

Examiner has also failed to respond to Applicant’s argument and evidence that examiner had already restricted different flavors of Applicant’s “composite material,” i.e. composite material candy bar, composite material cookie bar, and composite material granola bar, in the restriction of 5/2/2002, which examiner had taken *directly from original claims 6, 19, 21-23*, where it stated “composite material,” (Exhibit A, Election from Exhibit F initial claim 6, claims 19, 21-23, pgs. 1/3-3/3) and therefore “composite material” could not be “new matter.”

Applicant’s independent claim 6 recited:

6. The edible support of claim 1 wherein said support is a composite material, having a plurality of ingredients, said edible support being suited for a plurality of configurations and orientations, wherein said support is a candy bar, wherein said support is a cookie bar, wherein said support is a granola bar. (Exhibit F, pg. 1/3)

In the first Office Action on the merits on 5/23/2003 (Exhibit H pg. 2/5) examiner states:

“In fact, since the edible support is disclosed as being a composite how can it be homogenous? The two are mutually inconsistent.” (underline drawn by examiner)

Examiner also stated 5/23/2003 (Exhibit H pg. 2/5):

In regard to claim 76, claim 76 can be construed to recite that the edible support comprises one or more elements a through m, and particulate matter and a homogenous comestible....

Merriam Webster Online Dictionary:

**mutual:** 1. a : directed by each toward the other, or the others < mutual affection>.

**inconsistent** b : containing incompatible elements

Had Applicant's support been merely an assembly of parts, akin to the support of Firmin (US 1,769,215), i.e. a simple example of a baked stick topped with a chocolate coating, ...a *homogenous* coating could have coated another support part (homogenous baked stick) and one would still be *consistent*, or compatible with the other.

However, Examiner states: "In fact, since the edible support is disclosed as being a *composite* how can it be homogenous? *The two are mutually inconsistent.*"

N.B. Conclusion: Examiner's argument pertained to a "material" (an assembly of parts are not homogenous, or of a uniform structure or kind throughout (*Merriam Webster 2*). Thus, Examiner was well aware that Applicant's support comprised "a composite," [noun] i.e. "composite material," "comprising elements a through m..." ("ingredients of," (specification) candy, nuts, fruit, grain, chewing gum...) (Exhibit H, pg. 2/5) (Exhibit I, pg. 3/3, sent by PTO to Applicant, a composite, noun, entry 4. A solid material...) upon the sending of the first Office Action on the merits to Applicant on 5/23/2003, upon which Section 112, first and second paragraphs were satisfied for all independent claims.

**The United States Patent and Trademark Office Had Already Decided That "Edible Composite Support" Had \* Disclosed A "Composite Material" Under 35 USC Section 112, First and Second Paragraphs in The Office Action of 5/23/2003**

N. B. Applicant respectfully submits that it is notably improper for the United States Patent and Trademark Office to had already decided that *all claims* are proper under section 112, first and second paragraphs for the recitation of "edible composite support," as enabled and distinctly claiming a "composite," "a composite material," and then deny all of Applicant's claims for this reason for at least seven years thereafter. (Exhibit H, pg. 2/5, i.e. independent claims 72,87,91,95, "edible composite support," were not objected to, and (Exhibit H, pg. 3/5) no rejections under section 112, second paragraph, Non final Office Action of 5/23/2003) This is unjustified.

In addition, in this same first Office Action on the merits 5/23/2003, ALL of Applicant's independent claims, "which recited, "composite edible support," passed section 35 USC Section 112, first and second paragraphs, were clear to examiner, and were clear to one having ordinary skill in the art that Applicant's support comprised an edible composite material. ([0165], above) Applicants independent claims were claim 72, claim 87, claim 91 and claim 95. Note that section 112, first paragraph of the Office Action rejected only dependent claims 76-81, 89, 94, and 96. (Exhibit H, pg. 2/5 (first arrow) No rejections had been made regarding section 112. No restriction had been made for Applicant's method claims either.

As above, Examiner was well aware of Applicant's "composite material" and decided in this first Office Action on the merits that Applicant's "composite edible support" was in such full, clear and concise and exact terms as to enable any person skilled in the art to which it pertains or with which it is most nearly connected, to make and use the same as well, comprising "a composite

material,” and the claims particularly pointed out and distinctly claimed the subject matter which Applicant regarded as Applicant’s invention.

**N.B. Conclusion:** All of Applicant’s claims of a “composite edible support” had already been decided to be proper in claiming Applicant’s subject matter of a “composite material,” on 5/23/2003, under 35 USC Section 112, first and second paragraphs.

### **Claim Rejection 35 USC Section 112, first paragraph**

**3) Regarding Claim Rejections 35 USC Section 112, (first paragraph), examiner states:**

“In the instant case the term “composite material” changes the description of “a candy bar to “a composite candy bar”, which is not the same as a generic term “candy bar” as originally described. “ ... Therefore the amendments to the claim introduce new matter and the Applicant is required to cancel the new matter in the reply to this Office Action. (Pg. 4 of Final OA)

Examiner has failed to show how “composite material” is new matter. Applicant had argued that it is of the record that the specification recites: “composite candy bar”: in paragraphs [0197][0198] [0200]; (Filed specification (composite candy bar), original claims 6, 19, 21-23, restriction..., etc.) Applicant pointed out that examiner had already made a restriction from an originally filed claim among, a composite material candy bar, a composite material cookie bar, or a composite material granola bar on 5/2/2002. (Exhibit F original claims “composite material” based upon originally filed claims 6, 19, 21-23, and Exhibit A restriction, species IV(a), IV(b), IV(c)). Examiner has not answered Applicant’s argument, nor the substance of it.

Examiner stated: \* “In fact, since the edible support is disclosed as being a composite how can it be homogenous? The two are mutually inconsistent.” (5/23/2003 (Exhibit H, pg. 2) see section 102 below) Examiner not only found Applicant’s composite material to be not be new matter, but to be enabled and to distinctly claim Applicant’s subject matter, under section 112. No rejection had been made.

Examiner has continually failed to respond to Applicant’s argument in the Office Actions, but has systematically rejected all claims, without providing any evidence to the contrary. This constitutes continuing improper Office Actions.

### **Claim Rejection 35 USC Section 112, second paragraph**

**4) Regarding Claim Rejection 35 USC section 112, (second paragraph) indefiniteness for the**

recitation of "a composite material," examiner has not responded to Applicant's argument that the term "composite material" is a well known term, which has been used "as is" in a myriad of issued patents, without definition, such as for example, *issued* US patent to French et al., (6,284,294) filed November 22, 1999 (09/444,969) (filed before Applicant's was filed) which recites the term "composite material" ONLY in the claims (claims 12, 13) and NOT in the specification) and is well known to one having ordinary skill in the art, and therefore there is no requirement for Applicant to explain a well known term. "If elements of an invention are well known in the art, the Applicant does not have to provide a disclosure that describes those elements." MPEP 2106) Applicant had also argued in detail of "composite material" being used as clay bricks with straw embedded in it in ancient times. Examiner has not responded to Applicant's arguments but continues to reject claims 383-402 regardless.

### Claim Rejections - 35 USC Section 102

**The United States Patent and Trademark Office Had Already Decided that Applicant's Support Comprising an Edible "Composite Material" was Enabled, Distinctly Claimed, Novel and Unobvious Over the Reference to Musher as of at Least 5/23/2003**

5) Regarding 35 USC 102(b), claims 383-402 had been rejected as being anticipated by Musher (US 2,217,700).

Although a particular reference to Musher is addressed, Applicant respectfully submits that issues that are other than appealable issues are in question.

In response to the Amendment filed March 16, 2009, the Office mailed a final Office Action on July 9, 2009, which explained that all rejections to claims 383 and 394 were maintained because:

"Regarding claims 383 and 394, Musher teaches ice cream (frozen comestible) on a non-frozen edible support structure or a composite support which has at least two edible discernable (i.e. perceptible) edible confectionary materials or components that are combined together to make the support, i.e., two constituent ingredient materials (Page 1; Column 1, lines 37-46 and Column 2 lines 40-55), as instantly claimed. Also see (page 4: column 1, line 72 to Column 2, line 23 and figures 1-6)." (Final Office Action pages 6-7)

Independent claim 383 recites:

A non frozen support for a frozen comestible comprising an edible confectionary material comprising two ingredient materials within said edible confectionary material or two constituent materials.

Independent claim 394 recites:

A support for a frozen comestible comprising an edible composite material, said edible composite material comprises two ingredient materials within said edible composite material or two constituent materials.

Note that examiner does not address "composite material" but only "composite support." (Applicant found out in a telephone call with Examiner Chawla, that Examiner Chawla has been rejecting all claims under sections 102 and 103 based solely upon a truncated portion of Applicant's claims. Examiner Chawla admitted to rejecting the claims based solely upon Musher's support having "i.e., two constituent materials." Examiner stated that since Applicant's claims were "either/or" claims, that all she had to do was disprove one side of the "or" and that constituted her due diligence. Examiner continues to improperly base all rejections upon a truncated portion of Applicant's claims.

In the specification, Applicant's edible support is recited as "composite support 62," "composite support 62A," etc., and recites examples of composite material candy, cookie and granola. Examiner continues to deny Applicant's claims based upon the term "composite support."

**However:**

**N. B.** It had already been decided by the USPTO that Applicant's "composite support" was enabled, distinctly claimed, novel and unobvious over the reference to Musher as of at least 5/23/2003.

All of Applicant's claims had been cleared with respect to 35 USC Section 112, first and second paragraphs regarding the reference to Musher. It had also already been decided by the USPTO that all of Applicant's claims were novel under 35 USC Section 102 over the reference to Musher, i.e. no rejection for Musher under Section 102 was made in the Office Action; (Exhibit H, pg. 3/5, (5/23/03)). It also had been decided by the USPTO that all of Applicant's *independent* claims (72, 87, 91, and 95) were unobvious over Musher under 35 USC Section 103 (Exhibit H, pg. 4/5) Thus all dependent claims were also a fortiori patentable over Musher. Furthermore, examiner does not argue that Musher comprises a composite material, and therefore examiner agrees that Musher does not comprise a composite material.

Additionally, prior to the final Office Action, Applicant had requested constructive assistance with the claims under MPEP §706.03(d) and §707.07(j), but was denied assistance. Examiner responded:

"It is noted that Applicant has requested help from the examiner. Beside the fact Applicant either has had some experience prosecuting applications or has had experienced help, as evidenced by the fairly accomplished communications, the office provides help or makes suggestions relative to patentability, if the Office has discerned allowable subject matter, As of now, that has not been the case." (Exhibit H, pg. 5/5)

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Contrary to what examiner states, Applicant respectfully submits that as of that time "it was the case."

The support of Van Duren (Swiss patent 649197)(cookie) could not make a candy support, (agreed by examiner, i.e. no section 102 rejections), in view of a piece of candy of Laskey (1,566,329), with a filling placed inside, without any suggestion to support a comestible, (agreed by examiner), the combination of which would not comprise a suggestion to be combined to make Applicant's support. (Exhibit M)

No combination could show a composite material, as none of the references themselves comprised or suggested a composite material, or a "composite," (examiner, 5/23/2003), as they each showed only a single material, such as gum (Tezuka et al. 4,399,153) or a support with different parts, such as Van Duren, Laskey, or such as (Jones 1,947,010) with a chocolate coating, or unit structure (Musher 2,217,700).

The reference to Chan (6,177,110) was not prior art of Applicant. (Enabled disclosure document dated as early as 1994).

As far as Applicant is aware, all Applicants, whether pro se or represented, may be provided assistance with the claims. Examiner determined Applicant did not need assistance with the claims *after a single response to the first Office Action on the merits!* Examiner denied Applicant assistance even though Applicant had "patentable subject matter." This is unjustified.

Furthermore, in denying Applicant with assistance, examiner willfully changed the words and meaning of MPEP 707.07(j) from "patentable subject matter" to "allowable subject matter," such that Applicant would have to have the claims allowed before any assistance with the claims would be given to Applicant, (which is of the record as having been improperly delayed for many years), contrary to MPEP §706.03(d) and §707.07(j).

Examiner endlessly and willfully continues to truncate and manipulate Applicant's claims in the Office Actions and then rejects all claims based on examiner's own words and not the words of the claims. Examiner has failed to address Applicant's claims as recited. Examiner has failed to address the heart of Applicant's subject matter. Examiner has failed to address the substance of Applicant's arguments. This is failure of examiner and the PTO and not of Applicant. This activity may be seen throughout the examination, is of the record, and is improperly wasted time by the PTO and not by Applicant.

For example, in the present Office Action examiner removed Applicant's terms "material comprising two ingredient materials" and "composite material" from Applicant's claims 383 and 394 and rejected the claims based upon examiner's own insertion of "composite support."  
Examiner stated:

"...composite support which has at least two edible discernable (i.e perceptible) edible



confectionary material or components that are combined together to make the support, i.e., two constituent materials... as instantly claimed."

Independent claim 383 recites: A non frozen support for a frozen comestible comprising an edible confectionary material comprising two ingredient materials within said edible confectionary material or two constituent materials.

Independent claim 394 recites: A support for a frozen comestible comprising an edible composite material, said edible composite material comprises two ingredient materials within said edible composite material or two constituent materials.

All of Applicant's considered claims were then rejected and the Office Action was made final based upon this willful and erroneous examination. This is unjustified.

All prior art had been overcome in the response to the Office Action of 3/9/04.

N. B. Applicant submits that since Examiner found no other art to anticipate Applicant's claims, examiner(s) improperly reinstated the reference to Musher again on 10/17/05, (Exhibit J) without any evidence, and fails to answer that Musher does not show a solid material, a material comprising two materials, a composite material, or other arguments, as stated, (even though Applicant's subject matter had already been decided to be enabled, distinctly claimed, novel, and unobvious over Musher on 5/23/2003).

Examiner again rejects all the claims based upon a truncated portion of Applicant's claim:

14. "Musher teaches ice cream on an edible support having at least two discernable edible members wherein one portion extends into the ice cream and one portion extends out of the ice cream for holding. Musher teaches stick that may be completely edible,"

Applicant's independent claim 179 recited:

A supported frozen comestible comprising:

- (a) a supported frozen comestible, and
- (b) a composite candy support having two discernable edible members in contact with each other suitable for supporting said frozen comestible, said two discernable members each being other than an edible coating said composite candy support having a first portion extending into said frozen comestible, said first portion having sufficient surface area and means for adherence within said frozen comestible to support said comestible, said composite candy support having a second portion having a second portion extending outside said frozen comestible, said second portion having sufficient surface area to provide a utilitarian support for said comestible.

Even though Applicant's subject matter had already been determined by the PTO to be both novel and unobvious over the reference to Musher (Exhibit H, pgs. 3/5-4/5, 5/23/03), the

reference to Musher is continuing to be willingly and unjustly used under sections 35 USC 102, and 103 based upon examiner's own words and truncated portions of Applicant's claims, *a procedure admitted to by Examiner Jyoti Chawla on the telephone on January 29, 2010*, to deny Applicant's claims from being allowed.

No prior art has been found under 35 USC Sections 102 or 103, ("A person shall be entitled to a patent unless -") yet examiner(s) continue to unfairly reject all claims, without any factual evidence. Examiner(s) continue to fill Office Actions with non-compliant double-talk that does not answer the substance of Applicant's arguments, and promptly issues a final rejection after Applicant has paid for an impartial and fair examination (RCEs to keep the application alive). These responses are of the record, are in violation of the MPEP, (700 Examination) are respectfully submitted to be clearly unfair, and unjustifiable.

Examiner stated, "further a composite is defined as "made of separate elements",

"Reference V" was sent to Applicant by this same Examiner Jyoti Chawla. Reference V, pages from the Merriam Webster Dictionary which defined a "composite" [noun] as:

"a solid material made of two or more substances having different physical characteristics and in which each substance retains its identity while contributing desirable properties to the whole; esp a structural material made of plastic within which a fibrous material (as silicone carbide) is embedded."

Applicant argued that the dictionary recited "a composite" [noun] as a "solid material." Examiner has not addressed Applicant's argument.

Applicant had further argued that the patent to Musher was comprised of interstices or voids to hold ice cream within the structure, the reason for the invention.

Applicant argued that Musher did not comprise a "composite material," as according to the PTO dictionary definition sent to applicant from Examiner Chawla, a composite material was a solid material and Musher's unit structure was filled with interstices and therefore could not be a composite material. Applicant argued that Musher taught away from using a composite material, as the interstices were needed to hold his ice cream. (Exhibit K, pg. 1/3 - 3/3)

N.B. Examiner rejected all of the examined claims and made the Office Action final without addressing any of these arguments.

Applicant also argued the reference to Musher does not anticipate Applicant's claims as the supported confection of Musher is frozen and therefore Applicant's claims are not anticipated. Applicant's support is not frozen. Applicant noted that Examiner had stated that:

"The formed and coated support of Musher is non-frozen prior to addition of liquid and

freezing steps. Thus the composite support for a frozen confection as taught by Musher is not frozen until the ice cream material is poured into the voids and the entire structure is frozen." (Exhibit K, pg. 2/3)

Applicant brought up the fact that examiner agrees with Applicant that Musher's support is "entirely frozen."

Examiner still rejected all claims without responding to Applicant's argument and made the Office Action final. This is unjustified and constitutes an improper Office Action.

N. B. Applicant respectfully submits that it is notably improper for the United States Patent and Trademark Office to have already decided that *all independent claims, and thus all dependent claims* were both novel and unobvious over the reference to Musher on 5/23/2003, and to continue to use the reference to Musher against the claims without any evidence of a material comprising two materials, or an edible composite material, and to retain these groundless rejections for over seven years.

As above, Applicant respectfully submits that the finality of the Office Action is further noted to be improper, [emphasis added] as Examiner has continually failed to acknowledge Applicant's subject matter in years of Office Actions, although it is of the record that Examiner is well aware of Applicant's subject matter, having cleared the subject matter under section 112, in 2003.

#### Telephone Conversation Regarding the Final Office Action

N.B. Note that as of the conversation on January 29, 2010, regarding the above final Office Action, Examiner Jyoti Chawla stated that all Examiner Chawla had to do was disprove one side of the "or" in Applicant's claim which constituted examiner's due diligence. On January 29<sup>th</sup>, 2010, Examiner Chawla admitted to addressing only a truncated part of Applicant's claims for maintaining the rejections of all examined claims. Examiner's rejection was based solely upon, Musher teaching "i.e. two constituent materials," and thus admitted to sending an improper final Office Action to Applicant. (Exhibit L, Applicant's summary of telephone conversation with Examiner Jyoti Chawla re: final Office Action of 7/09/2009, pg. 4/4).

Examining only a portion of a claim is improper examining procedure and hence Applicant respectfully submits that the outstanding Office Action is therefore improper.

(TO ANTICIPATE A CLAIM, THE REFERENCE MUST TEACH EVERY ELEMENT OF THE CLAIM) MFEP 2131 Anticipation

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." Verdegaal Bros. v.

Union Oil Co. of California, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987).

#### **Reference to Feybusch:**

The Office Action also failed to address how Applicant's argument of how the structure of Feybusch (US 1,638,4880) is not a solid or a composite material, as it requires crevices to drain melting ice cream away from a user's hand when it is being eaten.

The Office Action also failed to address Applicant's argument of how the structure of Feybusch does not show a material that comprises two materials, as each of the materials of Feybusch shows only raw ingredients.

The reference to Feybusch was mailed to Applicant 4/30/2008, nearly eight years after Applicant's filed application, does not show a composite material, or a material comprising two materials, shows no new features for rejections under 35 USC sections 102 or 103, and is submitted to be non-compliant with compact prosecution, and improper.

#### **Reference to Lane:**

In the final Office Action, dependent claim 391 was rejected under 35 USC 103(a) as being unpatentable over Feybusch in view of Lane et al. (US 1,690,984).

#### **Claim 350 recited:**

The support for a frozen comestible of claim 383 wherein one of said two constituent materials comprises an edible hollow confection length, wherein the other of said two constituent materials comprises an edible filling placed in said hollow length, wherein said filling comprises a plurality of candy beads, colored sugar, flavored sugar, an edible confection rope, or a fluid ingredient, said two ingredient materials comprise two ingredient materials placed concentrically.

Claim 350 (391) had been previously presented for examination in dependent claim 350 on 7/30/2008. Claim 350 could have been rejected in an earlier Office Action but was not. (Exhibit L, Lane)

Section 706.07(a) of the MPEP specifies the conditions under which the finality of a second or subsequent Office Action is proper, providing that:

Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by Applicant's amendment of the claims nor based on information submitted in an information disclosure statement....

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Thus, Applicant respectfully submits that because claim 350 (391) was previously presented for examination in a preceding Office Action, the new ground of rejection of claim 391 made in the final Office Action is improper.

Introducing a new reference to Lane *after ten years* is also noted to be improper under the rules of compact prosecution. MPEP Section 707.07(g)

N. B. Applicant asked Examiner on the telephone why the claims were being rejected by Musher without any evidence. Examiner Chawla said that she was not making a section 102 rejection, but a section 103 rejection. When Applicant asked again to clarify the situation, "so you are not making a section 102 rejection?" Examiner Chawla chose not to answer. (Exhibit L, pg. 4/4, bottom arrow)

Applicant respectfully submits that the finality of the most recent Office Action and previous Office Actions have been improper for at least the willful detainment of Applicant's application without evidence of anticipation under 35 USC Section 102, unobviousness under 35 USC Section 103, unsubstantiated rejections under Section 112, first and second paragraphs, willful and express truncating of Applicant's claims to maintain the rejection of all claims, the withholding of Applicants method claims from consideration without argument or evidence, maintaining rejections without evidence, continual failure to address applicant's claims as recited, failure to consider the "heart" of Applicant's subject matter, which is documented to have been known by examiner at least as of the first Office Action on the merits, failure to address the substance of applicant's arguments, and failure to adhere and abide by the rules and regulations of the MPEP.

Applicant respectfully submits that new groundless rejections are being made throughout the application, even though Applicant's claims are respectfully submitted to be enabled, novel and non-obvious over all cited art.

#### Conclusion

The conditions at least as set forth in § 706.07(a) of the MPEP; MPEP 707.07(f) and at least for all the above stated reasons, have not been satisfied.

In view of the foregoing, Applicants respectfully requests withdrawal of the finality of the outstanding Office Action of 7/9/2009 and thus the withdrawal of the holding of abandonment for the above application. Applicants also respectfully requests that Applicant's method claims be properly reinstated and considered, and further requests that a new non-final Office Action that specifically addresses each of the foregoing arguments be sent to Applicant. Accordingly, as well